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In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

AMERICAN ELECTRIC POWER SERVICE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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Our petition for certiorari seeks review of the court of appeals' decision vacating the Commission's interconnection and full avoided cost rules. On the interconnection issue, respondents misapprehend the statutory language and misinterpret the legislative history. As for the full avoided cost issue, while respondents recognize that the basic question is one of statutory construction, their analysis of the statute is erroneous.

1. *Interconnection*

In our petition (at 11-14), we showed that Section 210 of PURPA rests on policy considerations discrete and separate from those that inform Sections 210 and 212 of the Federal Power Act ("FPA" or "Power Act"). Underlying Section 210 of PURPA is the stated congressional intention "to encourage [the] cogeneration and small power production" of electricity by qualifying facilities for sale to utilities

for resale in interstate commerce. To achieve this end, Congress fashioned Section 210 of PURPA to provide complete and self-contained authority to eliminate the longstanding barriers that had frustrated such transactions in the past. Under that broad grant of statutory authority, we submit, the Commission is empowered to issue rules requiring utilities to interconnect with qualifying facilities.

On the other hand, Sections 210 and 212 of the Federal Power Act were adopted by Congress to deal with a different problem: the refusal of intrastate utilities to interconnect with interstate systems in order to avoid regulation under the Power Act. To remedy that perceived inefficient use of resources, Congress adopted Section 210 of the Power Act and related provisions, which empower the Commission to order entities not otherwise subject to regulation under the FPA to make such interconnections. It is under this new authority in the Power Act—not Section 210 of PURPA—that an evidentiary hearing is required to determine whether interconnection would be in the public interest.

Respondents' arguments, like the decision of the court of appeals, ignores this critical difference in statutory objectives.

a. Respondents contend that because Section 210(e)(3)(B) of PURPA prohibits the exemption of qualifying facilities from Sections 210, 211 and 212 of the Power Act "without qualification or distinction" (Br. in Opp. 23), and because Section 210(a) of the Power Act "expressly includes qualifying facilities as applicants for interconnection orders" (*ibid.*), it must follow, by virtue of the "plain language of the statute" (*id.* at 24), that Congress intended to prohibit the Commission from ordering interconnection for purchases and sales under PURPA absent compliance with the evidentiary hearing requirements of the FPA. This analysis is flawed.

On their face, the FPA provisions simply delineate the rights and obligations of qualifying facilities under the Power Act; they say nothing of—much less do they diminish—the rights and benefits granted to qualifying facilities under PURPA.[1]

Moreover, as we pointed out in the petition (at 15), the structure and design of Section 210 of PURPA fully support our analysis. Had Congress intended to subject the Commission's authority over PURPA transactions to the procedural and substantive "safeguards" of Section 210 of the Power Act, it surely would have said that utilities must purchase from and sell to qualifying facilities—but only after compliance with Section 210 of the Power Act. And it would have said so in Section 210(a) of PURPA, where obligations are imposed on utilities, not in Section 210(e) of PURPA, which deals only with exemptions of qualifying facilities from regulation.

b. Respondents insist that Section 210(a) of PURPA is "by its express terms * * * limited to the Commission's *rate* rules" (Br. in Opp. 21; emphasis in original), and they argue that therefore the Commission has no authority under

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[1]Contrary to respondents' assertion (Br. in Opp. 21), the Commission's rules do not exempt qualifying facilities from Sections 210 and 212 of the Power Act. The regulations expressly state that qualifying facilities (except small power producers of over 30 megawatt generation capacity) "shall be exempt from all sections of the Federal Power Act, except * * * [sections] 210, 211 and 212 * * *." 18 C.F.R. 292.601 (see Pet. App. B-101, B-118). Thus, for example, qualifying facilities must satisfy the requirements of FPA Sections 210 and 212 before the Commission will approve an interconnection with a nonjurisdictional utility, or with a proximate utility in order to effectuate the wheeling of power to or from another more distant utility. Likewise, since qualifying facilities are not exempt from these provisions of the Power Act, they are subject to a Commission order to interconnect upon application of a utility or another facility. These "benefits" and "burdens" under the Power Act, however, have nothing to do with transactions under Section 210 of PURPA.

PURPA to mandate interconnections. To be sure, Sections 210(b), (c) and (d) of PURPA establish standards regarding rates that the Commission's rules must implement. But Section 210(a) of PURPA is not so limited. Indeed, that provision does not mention the term "rates." Rather, Section 210(a) of PURPA grants the Commission a broad mandate to issue rules to encourage congeneration and small power production, to require utilities to engage in transactions with qualifying facilities, and to address reliability problems regarding these new nontraditional power sources. Thus, the language of Section 210(a) of PURPA (not to mention the comprehensive scheme of the entire Section 210) strengthens our submission that Congress was dealing with discrete and separate issues when it enacted Sections 210 of PURPA and Sections 210 and 212 of the Power Act.[2]

c. Respondents further assert (Br. in Opp. 24-25) that Section 210 of PURPA as it was "initially passed by the House and the Senate" contained specific language directing the Commission to issue rules "respecting * * * interconnection," but that these were deleted in Conference. By

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[2]Respondents' argument (Br. in Opp. 26) that the Commission's rules under Section 210 of PURPA could not adequately protect the "powerful federal interest" in safe and reliable interconnections is undercut by the fact that Congress directed the Commission's PURPA rules to include provisions regarding "reliability" of service in the transactions between qualifying facilities and utilities. Consistent with this congressional directive, the Commission's rules entrust the utilities with determining what equipment is needed to interconnect safely and require qualifying facilities to pay for such equipment. 18 C.F.R. 292.306. See also 18 C.F.R. 292.307 and 292.308 (Pet. App. B-91 to B-94, B-115 to B-116). This is consonant with federal involvement in most interconnections. Utilities typically reach voluntary agreements regarding interconnections. These agreements are reviewed by the Commission, but principally with respect to economic considerations such as proper allocation of costs.

this deletion, respondents contend, "Congress demonstrated its intent to apply the procedural and substantive requirements of the FPA interconnection provisions" to Section 210 of PURPA (Br. in Opp. 25). This contention rests upon a faulty premise.

The House version of Section 210 of PURPA did have an interconnection provision. The Senate bill, however, took an entirely different approach, limiting the federal involvement in encouraging cogeneration and small power production to the issuance, not of rules, but of "guidelines" and "recommendations" that the states compel utilities to transact with qualifying facilities.[3] Neither the House nor the Senate, however, had imposed any evidentiary hearing requirements on transactions between utilities and qualifying facilities. Their disagreement centered on the appropriate degree of federal involvement: under the House version the Commission would have supplanted the states almost entirely, while the Senate version would have left the entire program to the states. The compromise hammered out by the conferees gives the states a substantial role in

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[3]The provision that is cited by respondents (Br. in Opp. 25) as reflecting the Senate's version of Section 210 of PURPA, H.R. 4018, 95th Cong., 1st Sess., Section 246(a)(2) (1977), appeared in the bill the Senate sent to Conference, but did not represent the Senate position. The House had passed the five bills constituting the National Energy Act in toto as H.R. 8444, 95th Cong., 1st Sess. (1977), but the Senate considered each bill separately and sent each bill to Conference separately. The Senate leadership accomplished this by using a different House bill as a vehicle; in the case of PURPA, this was H.R. 4018, a bill on import duties on certain antibiotics. The Senate amended that bill with a Title I, which was the Senate-passed energy bill, and a Title II, which was the portion of the House-passed H.R. 8444 on the same energy subject. See 123 Cong. Rec. 28176 (1977) (remarks of Sen. Byrd, Sen. Baker and Sen. Stevens); 123 Cong. Rec. 32695 (1977) (remarks of Sen. Byrd and Sen. Johnston). Thus, Section 246(a)(2) of H.R. 4018 relied on by respondents was simply a repetition of the House-passed version, Section 546(a)(2) of H.R. 8444, and was not an expression of the Senate's position.

case-by-case implementation of the program, within the general rules promulgated by the federal authority. See *FERC* v. *Mississippi*, No. 80-1749 (June 1, 1982), slip op. 7-8, 16.

d. Respondents suggest (Br. in Opp. 27-29) that their analysis, if accepted, would not hamper Congress' program of encouraging congeneration and small power production because evidentiary hearings need actually be held in only a small number of cases in which the Commission seeks to require a utility to interconnect with a qualifying facility. Even if respondents' premise is correct, however, the fact remains that each and every Commission interconnection order pursuant to the fact-oriented provisions of Sections 210 and 212 of the Power Act would be subject to judicial review under the substantial evidence test. See 16 U.S.C. 825*l*. The resulting delays would undermine Congress' goals in enacting Section 210 of PURPA. In that section, Congress established a scheme whereby the Commission would issue comprehensive rules to eliminate the barriers to cogeneration and small power production. Through this scheme Congress sought to insure that disputes over the application of the Commission's rules in particular cases would be settled expeditiously at the state level.

2. *Full Avoided Cost*

Respondents acknowledge (Br. in Opp. 10) that in considering the validity of the Commission's full avoided cost rule the decisive question "is one of statutory construction." Respondents argue that the full avoided cost rule adopted by the Commission "appears to conflict squarely with the statute's commands" (*id.* at 9; emphasis omitted) and "seems to violate the statute" (*id.* at 18). This straightforward assertion focuses on the real issue in this phase of the case—*i.e.*, whether the Commission has the statutory

authority to set rates at full avoided cost.[4] However, while respondents properly frame the issue, their conclusion does not withstand analysis.

a. Respondents argue (Br. in Opp. 14-15) that the Commission's full avoided (or incremental) cost rate is not a proper rate because it satisfies only one of the statutorily-mandated criteria for establishing a rule governing rates for purchases by utilities of electricity from qualifying facilities—presumably, the one that requires that rates "shall not discriminate against" qualifying facilities. The assumption underlying this claim is that under the statutory "just and reasonable" standard, the upper end of the "zone of reasonableness"—the area within which the Commission has the discretion to select a rate — falls somewhere below the level of full avoided cost. This assumption is based on legislative history indicating that the lower of a "just and reasonable" and a full avoided cost rate was to apply. The ultimate logic of respondents' argument appears to be that the Commission can *never* set rates at full avoided cost since such a rate would not be just and reasonable to customers of the utility.

But Congress did not establish a "zone of reasonableness" for the Commission in mandating a just and reasonable rate for purchases. The only limit specified in the statute is that the rate may not exceed incremental (or full avoided) cost.[5] By setting the rate at full avoided cost after

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[4]Nonetheless, respondents' assertion that the full avoided cost rule evades or appears to evade the statutory standards is at odds with their simultaneously made claim that the validity of the full avoided cost rule is not really at issue here because the court below held only that the Commission had failed to provide a sufficient explanation for that rule and remanded to the Commission to "provide a justification of the full avoided cost rule that satisfies the statutory criteria" (Br. in Opp 9).

[5]Section 210(b) of PURPA provides: "No such rule * * * shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy."

having thoroughly explained its reasons for rejecting a rate at a lower level (see Pet. 7-8), the Commission conformed to the statutory criteria.[6]

b. Respondents assert (Br. in Opp. 19) that, "[s]hould the Commission adopt a rule that provides a sharing of benefits (*i.e.*, a rule not requiring purchase rates to equal full avoided cost), the review by any appellate court will necessarily be different, and less inquisitive, than in the instant case." As respondents further explain (*id.* at 19 n.20):

> The difficulty which the Commission fears it might have in supporting itself on remand is confined to any future effort by the Commission to justify the full avoided cost rule, and has no application to defending a balanced rule. The Commission's concern focuses on the discussion by the Court of Appeals at Pet. App. B-12 to B-16 (FERC Pet. 21). However, the Court expressly confined the discussion at these pages (which are dicta) to what it described at the beginning of that discussion as "some additional concerns raised *by the full avoided cost rule.*" (emphasis supplied) Pet. App. B-12.

Contrary to respondents' novel assertion, we know of no legal principle that provides that an agency's order can be held to a different standard of review as a result of reaching one policy decision rather than another. While the rules

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[6]Respondents offer no support for the assertion (Br. in Opp. 17) that "[o]ne of Congress' purposes in enacting Section 210 of PURPA was to provide consumers with a share of the benefits of purchase transactions between cogenerators and utilities." The statute makes clear that PURPA Section 210(a) is designed to "encourage cogeneration and small power production," and is silent as to the rate effect on ultimate consumers. Nonetheless, as we explained in our petition (at 20-21), consumers will receive economic benefits over the long term if the congeneration and small power production program is permitted to flourish.

promulgated by the Commission pursuant to Section 210 of PURPA are subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, the court of appeals may not impose additional requirements upon the Commission merely because it disagrees with a particular policy choice. Yet, as respondents seem to suggest, that is precisely what the court did here. Such an approach is contrary to this Court's admonition that a court's authority in reviewing rate orders "is essentially narrow and circumscribed," *Permian Basin Area Rate Cases*, 390 U.S. 747, 766 (1968), and that a court may not substitute its judgment for that of the agency. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

c. Respondents contend (Br. in Opp. 17-18) that they are acting on behalf of their customers and that their shareholders have nothing to gain in this proceeding. This assertion is disingenuous.

It hardly needs saying that investor-owned utilities are in direct competition with cogenerators and small power producers as suppliers of electric power. The greater the amount of electric generating capacity constructed by qualifying facilities under the cogeneration and small power production program, the more electricity the utilities must purchase. Concomitantly, if the cogeneration program is successful, utilities will build fewer generating plants of their own and will be prevented from adding to their own rate base (and, consequently, to their return on investment). Thus, it is in the interest of utilities such as respondents to discourage cogeneration and small power production by insuring that qualifying facilities receive an income below the level at which they could operate profitably. It was precisely this type of impediment, however, that Congress sought to remove when it enacted Section 210 of PURPA.

For the foregoing reasons and those presented in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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